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No. 04-1316

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IN THE

Supreme Court of the United States

JOE BOB MONCRIEF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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This case presents two questions. The first is "[w]hether petitioner's sentence, imposed under the United States Sentencing Guidelines, is inconsistent with * * * *United States* v. *Booker*, 125 S. Ct. 738 (2005)." Pet. i. The second is "[w]hether the court of appeals erred in holding * * * that a defendant can never establish prejudice from an erroneous application of the Sentencing Guidelines * * * unless the defendant's actual sentence exceeded the permissible maximum under a correct application of the Guidelines." *Ibid.* The United States has filed a memorandum addressing the first question, agreeing with petitioner's suggestion (Pet. 15-16) that "the appropriate

disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of *Booker* and *Fanfan*." U.S. Mem. 1-2.

The United States' memorandum, however, does not address the second question presented, which is whether the Fifth Circuit adopted an incorrect test for establishing prejudice. In this case, the Fifth Circuit held that petitioner could not have been prejudiced by the district court's application of the wrong Guidelines edition—even though the correct version would have yielded a lower offense level—because petitioner's 210-month sentence fell within both sentencing ranges. That holding conflicts with the decisions of numerous courts of appeals, which have rejected the Fifth Circuit's test. See Pet. 17-18. That issue has continued importance both to petitioner and the courts because, under *Booker*, the Guidelines exert considerable influence on sentencing determinations. See *id.* at 18-19. As explained below, a recent ruling by the United States Court of Appeals for the First Circuit—decided after the instant petition for a writ of certiorari was filed—underscores the importance of correcting the Fifth Circuit's prejudice analysis.

I. The Conflict Among The Courts Of Appeals Regarding The Prejudice Standard Has Broadened Following *Booker*

In *United States* v. *Cruzado-Laureano*, No. 02-2658, 2005 WL 762119 (1st Cir. April 5, 2005), the First Circuit confronted a case legally indistinguishable from this one. In that case, as in this one, defendant was erroneously sentenced under the money laundering provisions of the 2000 Guidelines, rather than a subsequent edition. In that case, as in this one, the mistake was significant. As the court of appeals below and the First Circuit in *Cruzado-Laureano* recognized, "between the 2000 and 2002 editions, the sentencing commission introduced a major change in the

way that sentences for money laundering are calculated." *Id.* at *17; Pet. App. 25a ("Between 2000 and 2001, section 2S1.1 was almost completely rewritten."). In particular, the 2000 Guidelines provide "a fixed number as the base offense level for money laundering," whereas the 2001 Guidelines and later editions "take a more complicated approach by incorporating the offense level of the underlying offense." *Cruzado-Laureano*, 2005 WL 762119 at *17.

In light of those differences, the First Circuit concluded that sentencing under the post-2000 money laundering Guidelines would require resolution of several legal and factual issues related to the defendant's underlying offenses that otherwise would not have been considered by the district court. *Cruzado-Laureano*, 2005 WL 762119 at *17. Because of that, the First Circuit declined to conduct its own assessment of what sentence the defendant might have received under the correct Guidelines edition, and instead remanded the case to the district court:

> Sentencing under the [2002, rather than the 2000, guidelines] might involve factual disputes or legal issues which the district court has not yet had an opportunity to address. If we were to explore this uncharted territory ourselves, we, in effect, would be doing the sentencing rather than the district court. This is not an appropriate allocation of functions.

Id. at *17 (citations omitted).

The First Circuit also explained that, in light of *Booker*, it would be particularly inappropriate for the court of appeals to speculate as to the sentence the district court would have imposed. *Booker* rendered the Guidelines "advisory rather than mandatory," which "injects even more uncertainty into an attempt by [the court of appeals] to reconstruct a sentencing decision by the district court under the [correct] guidelines." *Cruzado-Laureano*, 2005 WL 7621119 at *17. Faced with such unknowns—both as to

how the district court would have applied the correct Guidelines in the first instance and as to whether it would have exercised its post-*Booker* discretion—the First Circuit "conclude[d] that the most prudent course is to vacate the sentence and remand for resentencing under the correct edition of the guidelines." *Ibid.*

In the present case, the Fifth Circuit did exactly the opposite. It declined to remand to the district court for consideration of the 2001 Guidelines in the first instance, instead attempting to determine what petitioner's sentence *could have* been under the 2001 Guidelines so as to evaluate prejudice. Pet. App. 26a. In so doing, the court of appeals found that the amount of loss was over $7 million; that there were more than 10 victims; and that petitioner employed sophisticated means in furtherance of the offense. *Id.* at 29a. The court of appeals then concluded that, under the 2001 Guidelines, petitioner's offense level would have been 36 and his sentencing range would have been 188 to 235 months. *Id.* at 27a-33a. That resulted in a lower offense level and sentencing range than that calculated under the 2000 Guidelines (37 and 210-262 months, respectively). *Id.* at 32a-33a. Nonetheless—and even though the district court had sentenced petitioner to the lowest possible sentence and had characterized that sentence as "heart-breaking"—the court of appeals found no prejudice because the district court would not "necessarily" have imposed a lower sentence. *Id.* at 32a. The Fifth Circuit's approach is thus directly at odds with the First Circuit's decision in *Cruzado-Laureano*.

II. This Court Should Grant The Petition, Vacate The Court Of Appeals' Judgment, And Remand The Case For Further Consideration As To Whether The Prejudice Inquiry Is Consistent With *Booker*

Although the court of appeals' approach to the prejudice inquiry had been rejected by numerous other courts of ap-

peals prior to *Booker*, see Pet. 17-18, the proper course is to afford the Fifth Circuit an opportunity to reconsider its position. As the First Circuit explained, *Booker* now makes it particularly difficult for a court of appeals to determine with any precision what the district court would have done had it applied the correct Guidelines. Indeed, the fact that the district court is no longer bound by the Guidelines introduces a substantial new variable. Accordingly, in addition to vacating and remanding for reconsideration in light of *Booker*, the Court should remand this case to the Fifth Circuit for further consideration in light of the First Circuit's very different post-*Booker* prejudice analysis in *Cruzado-Laureano*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). Alternatively, this Court should grant the petition to review the Fifth Circuit's prejudice standard.

Respectfully submitted,

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